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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1215

AMERICAN CANYON COUNTY WATER DISTRICT, a County Water District and a public corporation,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal from the Supreme Court of the State of California

Motion to Dismiss Appeal

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The Public Utilities Commission of the State of California, Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal in the above-entitled action upon the grounds that the appeal does not present a substantial federal question and that the judgment appealed from rests on an adequate non-federal basis and that the questions presented are so unsubstantial as to not need further argument.

STATEMENT

On October 13, 1964, after public hearings, appellee issued Decision No. 68010,[1] which authorized California-Pacific Utilities Co. to transfer a portion of its water system to the City of Napa (City) upon the joint application of California-Pacific and the City.[2] Appellant, a county water district, actively protested the application, seeking to eventually include the water system within its own service area.

The water system is located adjacent to the City. Consistent with its practice in similar cases, appellee's order provided in part:

> "This authority shall not be effective until the City of Napa files with the Commission a stipulation that, as to the service, rules and rates it will apply in the service area of the system herein authorized to be transferred, it will not discriminate between service rendered outside the city limits of Napa and service rendered within said city limits, except insofar as it may adjust such outside rates and charges to offset any reasonable tax burden sustained by water users within the city in pro-

1. 63 Cal. P.U.C. 439; Appendix C, Jurisdictional Statement.

2. Appellee's authorization for transfers of public utility properties is required by Section 851, California Public Utilities Code, which provides in part:

> "No public utility other than a common carrier by railroad subject to Part I of the Interstate Commerce Act (Title 49, U.S.C.) shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void."

viding for the operation of the municipal water system."

Decision No. 68010 was to become effective on November 2, 1964.

On October 30, 1964, appellee issued Decision No. 68108[3] which, at the request of the City, amended the above-quoted stipulation expressly in the interests of clarification so as not to exclude other reasonable grounds for rate differentials. The amended language provided:

"This authority shall not be effective until the City of Napa files with the Commission a stipulation that, as to the service, rules and rates it will apply in the service area of the system herein authorized to be transferred, it will not unfairly or unreasonably discriminate between service rendered outside the city limits of Napa and service rendered within said city limits."

Decision No. 68108 became effective October 30, 1964. On November 19, 1964, appellant filed a petition to reopen the proceeding on the grounds that Decision No. 68108 had issued without notice to appellant and an opportunity to be heard.

On December 9, 1964, appellee issued Decision No. 68319[4] which reopened the proceeding for the limited purpose of oral argument on the subject of the stipulation and its modification. Decisions Nos. 68010 and 68108 were stayed pending further order.

Oral argument was thereafter held, during which appellant sought to reopen the proceeding for the purpose of

3. 63 Cal. P.U.C. 506 (unreported); Appendix D, Jurisdictional Statement.

4. 63 Cal. P.U.C. 723 (unreported).

receiving additional, but unspecified, evidence. On December 30, 1964, appellee issued Decision No. 68404,[5] which concluded that no grounds existed for reversing the authorization to transfer the water system to the City; that the modified stipulation in Decision No. 68108 was no more than a clarification of the stipulation in Decision No. 68010 and that the modified stipulation was in the public interest. Appellant's petition to reopen the proceeding was denied and the stay of the earlier decisions vacated. Decision No. 68404 became effective January 9, 1965.

On January 8, 1965, appellant filed a petition for rehearing on the grounds that the Commission committed a number of errors in the original decision, No. 68010, as modified by Decision No. 68404. Decision No. 68700 denied rehearing without opinion on March 9, 1965. Thereafter, appellant sought review of appellee's Decisions Nos: 68010, 68108, 68319, and 68404, before the Supreme Court of the State of California which unanimously denied review without opinion on October 7, 1965 and a petition for rehearing on November 3, 1965.

ARGUMENT

I. Appellant Lacks Standing to Appeal

It is a general rule that political subdivisions of a state such as appellant, a public corporation created under the laws of the state, have no standing to invoke the provisions of the Fourteenth Amendment against that state. (*Coleman v. Miller,* 307 U.S. 433, 441, 83 L.Ed. 1385, 1390; *Trenton v. New Jersey,* 262 U.S. 182, 188; *State of California v. Marin Mun. W. Dist.,* 17 Cal. 2d 699, 705.) It has been said that "constitutional guaranties, ordinarily, at least, are not designed to protect one arm of the state from the body of

5. 64 Cal. P.U.C. 135; Appendix E, Jurisdictional Statement.

the state, but are to protect individual and corporate citizens against the state, or arms of the state." (*El Paso County Water Imp. Dist. No. 1 v. City of El Paso,* 133 F. Supp. 894, 906, reformed 243 F.2d 927, cert. denied 355 U.S. 820, 2 L.Ed. 2d 36.)

Appellee is a state regulatory agency created by the California Constitution with additional powers conferred by the California Legislature. (Cal. Const., Art. XII, secs. 22, 23.) Appellant, as its Jurisdictional Statement explains, is a political subdivision of the State of California which now asserts provisions of the Fourteenth Amendment against a constitutionally created body of that State. This, it is submitted, appellant may not do under the foregoing authorities.

II. Appellant Was Not Denied Due Process or Equal Protection

At pages 18-21 of the Jurisdictional Statement, appellant appears to argue that the California Supreme Court erred if it denied appellant's petition before that Court on the ground that appellant had not made timely petition for rehearing before appellee.

Clearly, the California Supreme Court did not err. As we have seen, three orders of appellee are involved: No. 68010, authorizing the transfer of the water system; No. 68108, modifying No. 68010 for purposes of clarification; and No. 68404, denying appellant's petition to reopen the entire proceeding.

Section 1731 of the California Public Utilities Code provides in part:

> "No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has made, before the effective date of the order

or decision, application to the commission for a rehearing."

Decision No. 68010 became effective November 2, 1964. Decision No. 68108 became effective October 30, 1964. Neither appellant nor any other party to the proceeding sought rehearing before November 2, 1964. Both orders therefore became final and conclusive. (*Sale v. Railroad Commission*, 15 Cal. 2d 612, 616; *Miller v. Railroad Commission*, 9 Cal. 2d 190, 199.) The failure to seek timely rehearing before appellee precludes review of such decision by the Supreme Court of California (*Northern Cal. Assn. v. Public Util. Com.*, 61 Cal. 2d 126; *Carlson v. Railroad Commission*, 216 Cal. 653; *Albin v. Railroad Commission*, 216 Cal. 655; *Clemmons v. Railroad Commission*, 173 Cal. 254.)

Decision No. 68404, denying appellant's petition to reopen the entire proceeding is the only order from which appellant could seek review. The only issue raised by such a petition for review was whether appellee properly exercised its discretion. (*Northern Cal. Assn. v. Public Util. Com., supra*, 61 Cal. 2d 126, 135; *Ashbury Truck Co. v. Railroad Commission*, 52 F.2d 263, 267, affd. 287 U.S. 570, 77 L.Ed. 501.)

Appellee did not refuse to exercise its discretion or indicate an erroneous belief that it had no jurisdiction to reconsider its prior orders. Decision No. 68404 considered the arguments advanced by appellant and other parties at the oral argument set pursuant to appellant's request and concluded that no basis for reopening existed and that the original decision as modified was in the public interest. (See *Northern Cal. Assn. v. Public Util. Com., supra*, 61 Cal. 2d 126, 135-136.)

Hence, under well settled California law, appellant was properly denied review of Decision Nos. 68010 and 68108 by the California Supreme Court. Insofar as appellant sought review of Decision No. 68404, appellant made no showing before the California Supreme Court and makes no showing before this Court that appellee abused its discretion in refusing to reopen the proceeding.

Most surely, no constitutional questions are raised. Appellant chose not to seek timely rehearing of the original decisions. In fact, appellant declared in a pleading before appellee that it had decided not to seek rehearing of the order authorizing the transfer, although disappointed with the result. *Nevertheless, appellee granted appellant further oral argument before concluding that there had been no change in the meaning or intent of the original order.* Appellant petitioned the California Supreme Court for review of all of the involved orders of appellee which petition fully presented and argued appellant's position. There is no requirement under state or federal law, nor does appellant appear to argue, that the California Supreme Court was bound to grant a hearing, just as there is no requirement under due process that this Court grant a hearing on all appeals and petitions presented to it. (See *Napa Valley Elec. Co. v. Railroad Com.*, 251 U.S. 366, 64 L.Ed. 310; *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 630-631, appeal dismissed 348 U.S. 859; 99 L.Ed. 677; *Southern Calif. Edison Co. v. Railroad Com.*, 6 Cal. 2d 737, 747.) Appellant's argument that it was denied "fair hearing" or "right to review" approaches the spurious.

III. The Transfer Authorization and Supporting Findings Involve No Due Process Questions

If there is any evidence to support a decision of appellee, such decision is not subject to review. (Sec. 1757, Calif. Pub.

Util. Code;[6] *Cal. Water & Tel. Co. v. Pub. Util. Com.*, 51 Cal. 2d 478; *California Portland Cement Co. v. Public Utilities Commission*, 49 Cal. 2d 171.)

Appellant does not contend that there is no evidence to support appellee's orders, but merely that such orders are "against the overwhelming weight of the evidence."[7] While appellee would dispute this self-serving characterization, it is clear nevertheless, that a mere conflict in the evidence involves no constitutional question nor any federal issue warranting consideration by this Court.

The Commission is required under California law to make findings on all material issues; however, it is within the discretion of the Commission to determine what issues are material. (Sec. 1705, Calif. Pub. Util. Code; *California Motor Transport Co. v. Public Utilities Com.*, 59 Cal. 2d 270, 275.) In proceedings involving the transfer of utility properties, the test employed by the Commission has been whether the proposed transfer would be adverse to the public interest. (*Sale v. Railroad Commission, supra*, 15 Cal. 2d 612, 620; *Hanlon v. Eshleman*, 169 Cal. 200, 203.)

Appellee's decision authorizing the transfer discusses at length the evidence and contentions of the various parties. The bases for the decision are clearly set forth and the finding made that the proposed transfer will be in the public

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6. Section 1757 provides in part that as to review by the California Supreme Court:

> "The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review except as provided in this article."

7. Page 13, Jurisdictional Statement.

interest. No reviewable, let alone constitutional, issue is raised by the findings.

Appellant argues repeatedly that appellee erred in authorizing the transfer because the customers of the water system lose the protection of appellee, since the system is transferred from a regulated to an unregulated entity, and do not acquire equivalent safeguards of political power since the customers reside outside the City.

The well established California law requires that where a municipality acquires a water system from a privately owned public utility or public utility water district, the acquiring municipality takes the system subject to the same duties and obligations under which the transferor provided service. The municipality assumes the duty to supply water without unreasonable discrimination and the users have the right to receive water to the same extent they formerly had. (*South Pasadena v. Pasadena Land etc. Co.,* 152 Cal. 579; *People ex rel. City of Downey v. Downey County Water Dist.,* 202 Cal. App. 2d 786, 797.) These principles apply even where some of the customers reside beyond the municipal boundaries. In the latter situation, the municipal corporation may charge higher rates for water service outside its boundaries than the rates charged within the municipal limits; however, the rates fixed must be reasonable and fair, and such rates may be reviewed in the courts to test whether they are unreasonable, unfair or fraudulently or arbitrarily established. (*Durant v. City of Beverly Hills,* 39 Cal. App. 2d 133.)

District does not show in what manner the legal rights to enforce the principles set forth in the *Durant* and other cases noted above are not as adequate, expeditious and effective as are afforded customers by the Commission's

regulatory authority.[8] A municipality has the right to operate a water system. (Calif. Const., Art. XI, sec. 19.) A public utility must obtain the permission from appellee to transfer its properties. (Sec. 851, Calif. Pub. Util. Code, see footnote 2, *ante*.) If appellant's argument were tenable, appellee could never authorize the transfer of a public utility system from a private entity to a public agency.

CONCLUSION

The appeal raises no substantial federal question. It is clear that the action of both appellee and the California Supreme Court rest on adequate non-federal bases. The issues raised by appellant were argued at length in briefs before the California Court which considered and unanimously rejected appellant's contention. It is respectfully submitted that appellee's motion to dismiss be granted without further argument.

Appellee is authorized by California-Pacific Utilities Company and the City of Napa, as the real parties in interest herein, to state that they are fully in accord with the views hereinabove expressed.

Respectfully submitted,

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Dated: May 4, 1966.

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8. Nor does appellant demonstrate that it is adversely affected by this portion of appellee's order and a proper party to raise this contention. (See *King County v. Port of Seattle* (Wash. Sup. Ct.) 223 P.2d 834, 841; *Stewart v. Davidson* (Ga. Sup. Ct.) 130 S.E. 2d 822, 826.)